



PATENT

Attorney Docket No. 71538

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

*21/ Appeal  
Brief  
Cheney  
8/5/03*

Applicant(s): James J. Fitzgibbon et al. )  
Application No.: 09/387,659 )  
Filed: August 31, 1999 )  
For: GARAGE DOOR OPERATOR )  
SAFETY EQUIPMENT )  
Group Art )  
Unit: 2837 )  
Examiner: Anthony J. Salata )

CERTIFICATE OF MAILING

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7/16/03  
Date

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**APPEAL BRIEF**

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313

Sir:

Real Party in Interest

The Chamberlain Group, Inc. is the real party in interest.

Related Appeals and Interferences

None.

Status of Claims

Claims 15 through 18 have been Finally Rejected and constitute the subject matter of this appeal.

Status of Amendments

No amendments have been submitted after the Final Rejection in this application.

The claims were previously amended in a Preliminary Amendment dated April 16, 2001

which has been entered.

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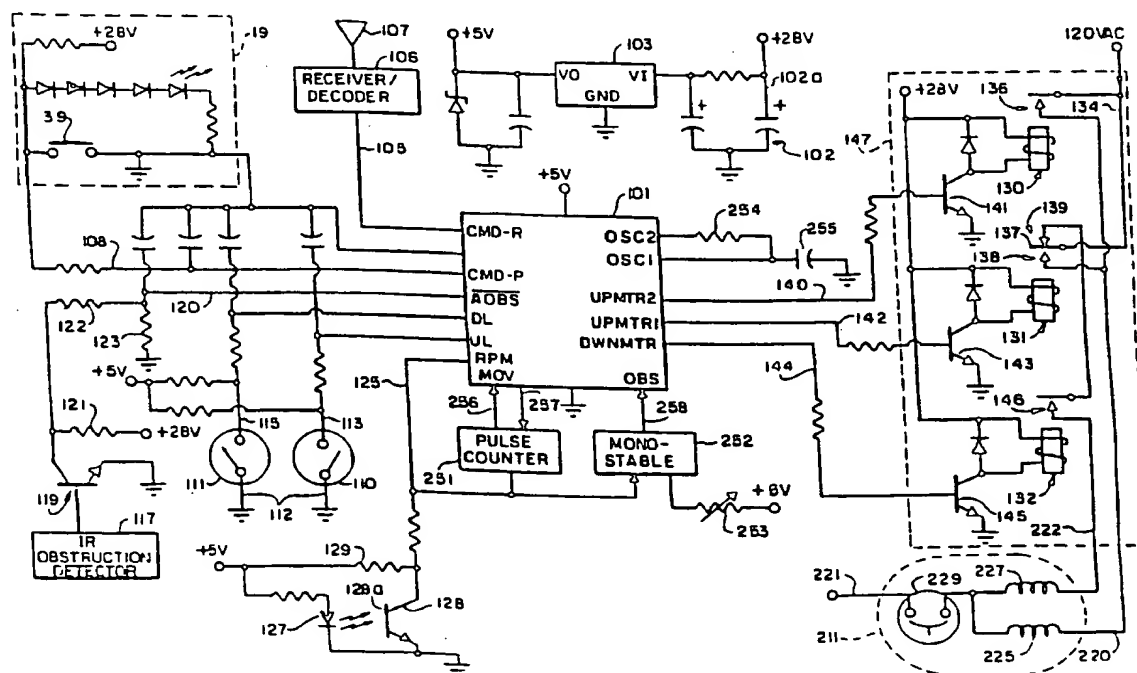
*Appeal Brief 1-1001*

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### Summary of Invention

The applicant provides a safety system for a movable barrier operator. The illustration shown below is figure 2 of the application which includes a controller 101 for controlling a motor 211 by means of commands sent to motor control circuitry 147. The motor is connected to a garage door in order to raise and lower the door. A problem with barrier movement operators is that the motor or motor control circuitry may improperly respond to a command from controller 101 and the barrier (garage door) may be incorrectly moved putting the barrier movement operator or people around it at risk. The intent of the inventions claimed both by the present application and the U.S. Patent 5,998,950 cited in the rejection of the present claims is to provide improved safety of operation.

Such safety improvements are provided by checking when a barrier control command issues, to see if the barrier is moving correctly, the motor control circuitry is functioning properly and/or the motor is functioning properly. If not, a fault signal is generated.



### Issues

Are claims 15-18 claiming the same invention as claims 16-22 of U.S. Patent 5,998,950 and subject to a “statutory double patenting” rejection under 35 U.S.C. §101.

### Grouping of Claims

For purposes of this Appeal, all of the claims may be considered as a single group.

### Argument

The claims 15-18 of the present application stand finally rejected under 35 U.S.C. § 101 as representing statutory type double patenting in view of U.S. Patent 5,998,950 (the ‘950 patent). This is the second rejection of the claims on this basis.

The appropriate standard for statutory double patenting is set forth throughout MPEP § 804. Particularly in § 804 IIA “Statutory Double Patenting-35 U.S.C. § 101 where it is stated that

“Same invention” means identical subject matter. *Miller v. Eagle Mfg. Co.*, 151 U.S. 186 (1984); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Ockert*, 245 F.2d 467, 114 USPQ 330 (CCPA 1957).

A reliable test for double patenting under 35 U.S.C. § 101 is whether a claim in the application could be literally infringed without literally infringing a corresponding claim in the patent. *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970).

In accordance with judicial authority and the MPEP § 804 as discussed above, when a claim in the present application could be literally infringed without literally infringing a claims of the cited patent, statutory type double patenting is not shown.

Claims 16-22 of the ‘950 patent all include a motor as an element of apparatus claims or as a necessary part of support structure on which the method claims operate. None of the applicants present claims 15-18 recite a motor. Additionally, claim 15 of the present invention recites a method including the step of “checking the movement control apparatus to determine whether the command is being correctly performed”. In contrast, claim 16 of the ‘950 patent recites “detecting a malfunction of the motor control circuitry

in response to the first motor control command by sensing door movement after the first motor control command is sent". A device that does not sense door movement to detect if a fault has occurred, would not literally infringe claim 16 of the '950 patent, but could literally infringe the instant claims.

Further, claim 20 of '950 recites that malfunctions are detected by identifying incorrect energization of a motor and further recites that a second motor control command is sent to the motor control circuitry when it is detected that door movement is not in accordance with a first command. Nothing in applicants' independent claims 15 or 18 requires identifying incorrect energization of a motor or the issuance of a second motor control command.

Also independent claim 22 of the '950 patent calls for "sensing door movement after the first motor control command is sent to detect a malfunction of the motor control circuitry in response to the first motor control command" (emphasis added). A device that does not sense door movement to detect if a fault has occurred would not literally infringe claim 22 of the '950 patent, but could literally infringe the instant claims. None of applicants' claims 15-18 recite sensing door movement and accordingly could be literally infringed without literally infringing a claim of '950.

In view of the above discussion, applicant asserts that it would be possible to literally infringe applicants' claims 15-18 without literally infringing claims 16-22 of '950. Accordingly, standard for evaluating statutory double patenting set forth in MPEP § 804 and discussed above has not been met by the examiner and the statutory type double patenting rejection is believed improper.

The examiner in the final rejection appears to ignore the above arguments based on cited authority and proceeds to claim statutory double patenting based on summarized and redacted versions of applicants' claims as well as those of '950. An element in a claim should be interpreted for literal infringement with all of its words intact. Applicant

requests that the instant claims 15-18 and claims 16-22 be evaluated for what they include - not what they can be summarized to include. When the claims are interpreted in their plain meaning as set forth in MPEP § 2111.01 it is apparent that literal infringers of claims 15-18 may not be literal infringers of claims 16-22 of '950.

Appellant therefore respectfully asserts that the rejection of claims 15-18 under 35 U.S.C. § 101 is improper and requests that it be overturned.

#### **Appendix - Claims**

15. (Amended) In a movable barrier operator comprising a movement control apparatus for controlling movement of a barrier in response to commands, the method comprising:

    sending a command to the movement control apparatus specifying one of open, close, or stop movement of the barrier;

    checking the movement control apparatus to determine whether the command is being correctly performed;

    generating a signal when the checking step determines that the command is not being correctly performed; and

    controlling barrier movement in response to the generated signal.

16. A method according to claim 15, wherein a stop command is sent to the movement control apparatus thereby directing the barrier to stop, and the checking step checks the movement control apparatus to identify whether the barrier has stopped.

17. A method according to claim 16, wherein an open command is generated directing the opening of the barrier if the checking step indicates that the barrier has not stopped.

18. (Amended) An apparatus for controlling a movable barrier operator, the apparatus comprising:

a controller for sending commands to a movement control apparatus specifying one of open, close, or stop movement of the barrier;

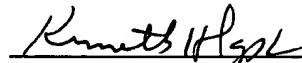
the movement control apparatus for controlling barrier movement in response to the commands sent by the controller and in response to signals generated by a fault identifying apparatus; and

the fault identifying apparatus for checking the movement control apparatus to determine whether the command sent from the controller is being correctly performed and for generating a signal when the command is not being correctly performed.

Respectfully submitted,

July 16, 2003

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